Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

TOMMY J. ABBOTT, et al.,
Petitioners,

v.

PIPEFITTERS LOCAL UNION NO. 522
HOSPITAL, MEDICAL, AND LIFE
BENEFIT PLAN, et al.,
Respondents.

Petition For Writ Of Certiorari
To The United Stated Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

I. Does the Employee Retirement Income Security Act permit trustees of an employee welfare benefit plan to discriminate by charging participants from one local union a rate significantly higher than that charged to participants from the local union which hosts the employee welfare benefit plan in contravention of plan language?

II. Does the fact that individual trustees would be financially affected by a decision regarding the raising of contribution rates necessitate a strict standard of review of such decision?

LIST OF PARTIES

Plaintiffs:

Tom Abbott
William H. Ashley
Samuel W. Barnett
Shirley J. Basham
Alvin T. Belcher Anthony H. Belcher
Harold F. Belcher
Gary C. Bell
Russell W. Bell
Robby L. Boling
Kenneth E. Boswell
Nuel R. Brown
Richard D. Brown
Lester Bryant, Jr.
Jonathon D. Bryant
William D. Bryant
Mark A. Buckner
Truman D. Burden
Joseph W. Calvert
Waymon E. Cambron
Jeffrey Campbell
Ernest Carter, Jr.
Omer Dean Case
Eugene Cheshire
Joseph Christian
Charles W. Cobb
Norman Ray Cole
Basil Collins, Jr.
Don P. Conley
John P. Conley
Sandra L. Conrad
Wallace Cook, Jr.
Gaylord E. Cox
Bobby D. Crabtree
Hubert L. Crabtree
Johnnie E. Crick
Joseph Crisp
Howard W. Curry
Edward L. Dewitt
Robert M. Downs
Joseph C. Edge
Joseph Byron Edge
Stephen D. Edge
Phillip D. Embry
Douglas W. Estes
Murry D. Estes
Thomas M. Estes
Charles Eubank
Mikel Evans
Mikel Evans, Jr.
James D. Farmer
Terry J. Faught
Charles L. Foster
Stanley W. Frazier
Ernest Gene Free
Ricky Lee Free
Rodney Gilliam
Glenn T. Grayson

William Greenwell
David Allen Hall
Donald A. Hall
Michael A. Hall
Jeffrey Hansford
Delmar L. Hardison
Edward Harlow, III
Edward Harlow, Jr.
Albert B. Harned
Charles L. Hayden
Fred Hayes (Dec'd)
George E. Hayes
Daniel P. Hayes
David Mark Hayes
John W. Health
Ellis H. Hedges
Cleveland Hendrick
Philip Hill
Joseph B. Hobbs
John P. Howard
Michael L. Howard
William D. Huff
William P. Huff
Jerry Lee Hurm
Gary Dean Johnson
Joseph H. Jones
John F. Jones
Joseph M. Jones
Willie Kaysinger
Norman Kline, Jr.
Carlos R. Knight
Michael W. Koger
Danny L. Lear
Bruce Leathem
Robin D. Leathem
Thomas H. Leathem
Thomas E. Lee
Lanny Ray Likens
Gilbert L. Lindsey
Stephen L. Lindsey
George M. Martin
Joseph Mattingly
Gary Mattingly
Loyle R. Mattox
Auburn McBride
Eddie McKinley
Elery G. Millay
John M. Millay
James T. Miller
Joseph R. Mills
John A. Morris
Daniel R. Morris
Larry Murphy
Rondall Northern
Patrick O'Bryan
Paul O'Nan
C. Delmer Payne
Chas. Doug Payne
David G. Payne
Patrick Payton
Clifford Peach
Dennis Peach
Micky L. Peach
James Phillips
Dwight Pile
Robert E. Poole
Larry R. Potts
Tony M. Potts

Donald J. Prout
Lloyd F. Pyle
Brian A. Raley
Harold Rayman, Sr.
Jack A. Rayman
Ronnie Remole
William Renfrow
Harold Richards
Danny Richeson
Rick Richeson
James Rivers
John W. Rivers
Anthony Roark
William Roberts
George Saltsman
Christopher Sauer
Robert O. Sauer
Henry Odell Sawyer
Silas E. Sawyer
Starling Sawyer
Walter P. Sims
Gary L. Sims
Roger Dale Sims
Earl Skaggs
Chas. Staves, Jr.
Barry Staves
Stephen Staves
James F. Stowers
Wm. D. Sutherlin
Joseph Tabor
Joseph Tabor, Jr.
Steve J. Tabor
Anthony O. Taylor
James B. Tichenor
Phillip Timbrook
James Lloyd Todd
James L. Trainer
Dennis L. Traylor
Gary W. Trice
L. Edward Turner
Thomas Turner, Jr.
David L. Wagner
Mark A. Wagner
Richard A. Wall
Ron Wallace, Sr.
James L. Walley
Fred W. Watts
Bobby R. Webb
Wm. F. Webb, Jr.
Chas. Westerfield
Donald L. Whitney
Gerald Whittaker
Howard Whittaker
Lyndal Whittaker
Mark Whittaker
Rondal Whittaker
Wendell Whittaker
Bruce Wimsatt
Donald E. Wink
Lawrence Wink
Marvin Wink
Nick J. Wink, III
Haynes Woods
Wallace A. Woods
David A. Wright
David Young
John C. Zaremba
D. Cole

H. Bershire
Joseph B. Crisp
Stanford Embry
Ralph Eubank
Otis Follin
J. R. Gilstrope
Walter Griffin
James T. Hall
Ed Harlow, I
J. B. Harrell
Charles E. Hayden
Ottis Heath
William Howard
William Jagoe
Darrell Kassinger
Joseph Keller
Marion Lovay
Sonny Lovay
Eddie Luellen
Jesse Mattingly
James McLemons
Charles Medley
James N. Millay
Roger Morris
L. T. Orange
Ellis Patton
Huber Richeson
Lyman Richeson
Blymon Saltsman
Gayl Saltsman
Tommy Schwartz
C. H. Stephens
J. O. Stewart
Tommye Stewart
Wallace Stewart
Roger Stinnett
James Stratton
Cavles Stroud
L. B. Todd
John W. Trainer
James Traylor
Randall Turner
Thomas Turner
Robert Underwood
John C. Varble
James Vaughn
Elsie Vick
James Wall
Gooch Wosley
Glenn Yeiser
William K. Yeiser
Howard Young
Local 633 Plumbers
and Steamfitters

Defendants:

Pipefitters Local Union No 522, Hospital, Medical, and Life Benefit Plan

Trustees of the Pipefitters Local Union No. 522 Hospital, Medical, and Life Benefit Plan

Joseph Warren

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES ix

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

I. WHERE THE PLAN LANGUAGE TREATS ALL PARTICIPANTS IDENTICALLY AND THERE IS NO AMENDMENT OF THAT PLAN LANGUAGE, TRUSTEES OF THE WELFARE BENEFIT PLAN MAY NOT SET INDEPENDENT CONTRIBUTION RATES BASED SOLELY UPON LOCAL UNION AFFILIATION OF THE PARTICIPANTS. THE DECISION BELOW IS IN CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *EPRIGHT V. ENVIRONMENTAL RESOURCES MANAGEMENT, INC. HEALTH*

AND WELFARE PLAN, 81 F.3d 335 (3rd Cir. 1996). 9

II. THE FINANCIAL INTEREST OF THE INDIVIDUAL TRUSTEES IN THE DECISION AT THE HEART OF THIS CASE NECESSITATES A STRICT STANDARD OF REVIEW. 12

Conclusion 14

APPENDIX A (Decision of the United States Court of Appeals for the Sixth Circuit, August 29, 1996) App.1

APPENDIX B (Findings of Fact, Conclusions of Law, and Memorandum Opinion of the United States District Court for the Western District of Kentucky, December 6, 1994) App.16

TABLE OF AUTHORITIES

Cases Cited:

Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983) 12, 13

Epright V. Environmental Resources Management, Inc. Health and Welfare Plan, 81 F.3d 335 (3rd Cir. 1996) 9, 10

Firestone Tire and Rubber Company v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) 10, 11, 14

Mahoney v. Board of Trustees, 973 F.2d 968 (1st Cir. 1992) 12

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992) 12, 13

Statutes Cited:

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 7

29 U.S.C. §1104 ..... 2, 3, 4, 5

29 U.S.C. §1132 7

29 U.S.C. §1161 7

PETITION FOR WRIT OF CERTIORARI

Tommy J. Abbott and all other listed plaintiffs ("Abbott") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 29, 1996, in order to resolve the conflict between the Sixth and Third Circuit Courts of Appeals and another between the Sixth Circuit and the Fifth and Eighth Circuit Courts of Appeal on important questions of Federal law which have not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reported at 94 F.3d 236 and is reproduced in Appendix A filed herewith at page App.1. The unreported opinion of the District Court in this case is reproduced at Appendix B herewith at page App.16.

STATEMENT OF JURISDICTION

On December 6, 1994, the United States District Court for the Western District of Kentucky issued a Memorandum Opinion entering judgment in favor of defendants. On December 28, 1994, Abbott filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On August 29, 1996, the Sixth Circuit affirmed the judgment of the

District Court. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within ninety days after the entry of the judgment by the Court of Appeals.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED IN THIS CASE

The pertinent provision of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001, et seq. ("ERISA") is set forth below:

§1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of

an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for

individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) Under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990."

STATEMENT OF THE CASE

Since the facts are not disputed, the statement employed by the United States Court of Appeals for the Sixth Circuit in its decision are largely incorporated here. *See Abbott*, 94 F.3d at 237-239 (Appendix A, pp. App.2-App.6)

In 1955, Pipefitters Local No. 522, based in Louisville, Kentucky, established the Pipefitters Local No. 522 Hospital, Medical, and Life Benefit Plan ("Plan"). In 1970, members of Local Union No. 633, which is based in Owensboro, Kentucky,

joined the plan as a group. The plan is a multi-employer, union-sponsored welfare plan that pays scheduled medical, health, and life benefits on claims made by participants. The plan is primarily funded by contributions from employers of plan participants, members of Local Unions 522 and 633. The amount of the employer contributions is governed by the Collective Bargaining Agreement in effect between the Union and the Association of Employers for whom the Union members and the participants work, and is calculated as an hourly rate upon hours worked by each employee. Should a participant not work a sufficient number of hours to have coverage under the plans and therefore fall short of employer-made contributions, the participant may make direct contributions to continue the coverage. Prior to 1990, the contribution rate did not vary depending on the Local Union affiliation of a participant. In early 1990, the hourly rate of contribution for coverage was $1.70. In the Spring of 1990, the Trustees of the Welfare Benefit Plan, two of whom were employer trustees employing members of Local 522 and two of whom were officers of Local 522, sent a letter to participants of Local 633 advising that their contribution rate would be raised to $3.36 per hour while the contribution rate for Local 522 participants would be only $1.90 per hour. The letter also advised participants from Local 633 that if they did not pay the higher hourly amount, the schedule of benefits to which they were entitled would be reduced to correspond to the lesser amount paid per hour. The Trustees never amended the plan to permit differentiated contribution rates or different benefit levels for elegible participants solely on the basis of Local Union affiliation.

The plan documents define "union" to mean Local 522 and 633 as an identity; additionally, the terms "employee" and "eligible employee" are defined without any reference to local union affiliation. There is no provision in the plan which permits

trustees to differentiate among participants as to the setting of contribution rates based only on local union affiliation.

At the time the trustees decided to impose the dramatically different rates upon participants based upon local union affiliation, as stated above, no plan amendment had been entertained or discussed, and alternatives to discrimination on the basis of local union affiliation were not examined. In other words, no evaluation was made as to how much participants' rates would need to be raised if an across-the-board increase were instituted. On March 12, 1991, more than 100 members of Pipefitters Local Union No. 633 filed a complaint against the plan, its trustees, and an individual-named trustee, alleging breaches of fiduciary duty in violation of ERISA, violation of the reporting and disclosure requirements of ERISA and of the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §1161 et seq., and an individual breach of duty claim against Trustee Joseph Warren. The subject matter jurisdiction over those claims was proper under 28 U.S.C. §1331 and 29 U.S.C. §1132.

On February 4, 1994, the District Court granted summary judgment against plaintiffs as to Count III and denied summary judgment as to Counts I and IV. On July 18, 1994, the parties submitted a stipulated record to the Court for consideration of this matter, fully briefing the trial issues by August 8, 1994. On December 6, 1994, the District Court entered judgment in favor of defendants (Appendix B, p. App.25).

On appeal, the United States Court of Appeals for the Sixth Circuit held that although the District Court had employed the incorrect reasoning, the Court's judgment in favor of defendants should be affirmed. The Court held that the

decisions of the trustees in this matter were not subject to review for compliance with ERISA's fiduciary duty standard. 94 F.3d at 240 (Appendix A, pp. App.9-App.10). The Court further held, that although the decision made by the trustees was not permitted by the plan language, it was merely an administrative decision within the powers of the trustees to make. 94 F.3d at 240 (Appendix A, p. App.9). The Court additionally held that although the trustees had a financial interest in their decision to discriminate against Local 633 participants, this did not require a strict standard of review of the decision. 94 F.3d at 241 (Appendix A, pp. App.11-App.12). Finally, the Court concluded that although the trustees did not examine any alternative except the discriminatory rate increase and concomitant benefit reduction, the Court considered that to be an "effort to achieve a reasonable level of parity" and was not therefore arbitrary and capricious. 94 F.3d at 241 (Appendix A, pp. App.12-App.13).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to address an important question of Federal law that has not been, but should be settled by this Court and also to resolve a split between the Federal Circuit Courts of Appeals on an important question concerning the standard of review employed when trustees' interpretations differ from the Plan language and whether trustees may impose restrictions on participation which are not required by the Plan documents as well as the effect of Trustees' financial interest upon the standard to be employed by a reviewing court.

I.

WHERE THE PLAN LANGUAGE TREATS ALL PARTICIPANTS IDENTICALLY AND THERE IS NO AMENDMENT OF THAT PLAN LANGUAGE, TRUSTEES OF THE WELFARE BENEFIT PLAN MAY NOT SET INDEPENDENT CONTRIBUTION RATES BASED SOLELY UPON LOCAL UNION AFFILIATION OF THE PARTICIPANTS. THE DECISION BELOW IS IN CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *EPRIGHT V. ENVIRONMENTAL RESOURCES MANAGEMENT, INC. HEALTH AND WELFARE PLAN*, 81 F.3d 335 (3rd Cir. 1996).

The Third Circuit in *Epright* held that trustees of a plan act arbitrarily when they impose standards for participation that are not required by the plan itself. The Court further noted that only written amendments, executed in accordance with the plan's procedure for amendments, may change the plan since oral amendments are not valid.

The Sixth's Circuit decision below found that the trustees in this case did not act arbitrarily or capriciously even though they voted to grant participation to members using different standards for members of Local 522 from those used for members of Local 633. This is in direct contravention of all plan and trust documents. Both the plan and the trust define the term "Union" to mean Local Union No. 522 and Local Union No. 633. Both the plan and the trust documents define "EMPLOYEE" and "ELIGIBLE EMPLOYEE" as members of either union. The plan itself specifically sets out the benefits which an eligible employee (both Local 522 and Local 633 members) is entitled to receive. In spite of this plan structure which provides an identity of interest for both Local Unions, the trustees imposed a rate structure whereby members of Local Union 633 would be required to pay $3.36 per hour for benefits and members of Local Union 522 would only have to pay $1.90 per hour. The trustees advised members of Local 633 that they would have to pay this amount or would only receive 50% of the benefits as set out in the plan. There is NO provision in the plan which authorizes Trustees to provide only 50% of the benefits to an eligible employee. Instead, an eligible employee is entitled to all benefits provided in the plan.

In approving the action of the trustees in this matter, the Sixth Circuit Court of Appeals has permitted the trustees to impose an additional standard not required by the plan itself; that is to say, in order to be entitled to full benefits under the plan, one must be a member of Local Union No. 522 even though the plan specifically refers to Local Union No. 522 and Local Union No. 633 as an identity. This interpretation of ERISA not only conflicts with the interpretation of the Third Circuit in *Epright*, it is simply perverse. As this Court reminded us in *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L Ed.2d 80 (1989), Congress gave us

ERISA so that the interests of employees and their beneficiaries under welfare benefit plans would be promoted not subverted. *Firestone*, 489 U.S. at 113, 109 S.Ct. at 956.

Certiorari is appropriate here.

II.

THE FINANCIAL INTEREST OF THE INDIVIDUAL TRUSTEES IN THE DECISION AT THE HEART OF THIS CASE NECESSITATES A STRICT STANDARD OF REVIEW.

The Sixth Circuit's decision below failed to address in any respect the financial interest of the trustees in the decision they made to discriminate against participants from Local Union No. 633. The undisputed evidence before the Court has always revealed that three of the four trustees were members of Local Union No. 522, none of the trustees were members of Local Union No. 633, two of the four trustees were employers of members of Local Union No. 522 and none of the trustees were employers of Local Union No. 633 members. The Sixth Circuit's approach is in direct conflict with the standard employed by the Fifth and Eighth Circuit Courts of Appeal. In *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992) and *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), the Eighth Circuit and the Fifth Circuit, respectively, determined that a trustee with a statutorily permitted financial and/or conflict of interest is required to investigate alternative actions and rely upon outside advisors before implementing a challenged decision.

The Sixth Circuit's decision below only stated that "the Court would not infer that the trustees act improperly merely because they necessarily would be affected by any decision which resolved the need to raise contribution rates." 94 F.3d at 241. The Sixth Circuit there cited *Mahoney v. Board of Trustees*, 973 F.2d 968 (1st Cir. 1992), interpreting that a trustee's status as a beneficiary does not necessitate a strict standard of review of decisions and that the standard of review remains to be the arbitrary and capricious level. This very short

statement by the Sixth Circuit not only ignores the true relationship of the trustees (two of whom were employers who would have to pay higher rates if an across-the-board increase were instituted), but also brings its decision into conflict with those from the Fifth and Eighth Circuits, cited above.

The trustees in this case have always freely admitted that they gave absolutely no consideration to any alternative except to discriminate against participants from Local Union No. 633 by charging them a contribution rate nearly double that of members of Local Union No. 522 or halving the benefit schedule of participants from Local Union No. 633. It is additionally undisputed that since the size of the group from 522 was considerably larger, an across-the-board increase of contribution rate, without use of an impermissible discrimination on the basis of Local Union affiliation would not have been nearly as large as the $1.66 per hour increase imposed upon participants from Local Union 633. Additionally, the trustees selected a peculiar time period (44 months) to examine the relationship and claims history of members of Local 522 versus Local 633. This time period does not represent any particularly pertinent fiscal period for the Fund, and does not represent the entire claims history for either group. Had the trustees been required to satisfy the standard enunciated by the Fifth and Eighth Circuits, instead of the extremely relaxed standard of the Sixth Circuit, they should at least have examined the entire claims history of each group rather than select an awkward time period; the selection of such an ill-defined time period leads unescapably to inferences that the trustees were seeking the time period which most accentuated claims by Local 633 participants.

Whereas the decisions of the Eighth and Fifth Circuits in *Martin v. Feilen* and *Donovan v. Cunningham*, respectively, appropriately construe ERISA as an enabling device for the

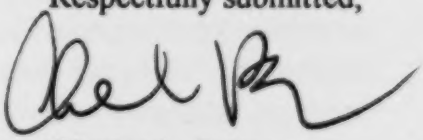
protection of participants, the Sixth Circuit's decision below construes ERISA as imposing upon trustees fewer fiduciary duties than they were obligated to fulfill at common law. *See, e.g., Firestone, supra*, 489 U.S. at 113-14, 109 S.Ct. at 956.

Certiorari is appropriate here.

Conclusion

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0283P (6th Cir.)
File Name: 96aO283p.06

No. 95-5063
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOMMY J. ABBOTT, et al., *Plaintiffs-Appellants,*	)
v.	)ON APPEAL
PIPEFITTERS LOCAL UNION NO. 522 HOSPITAL, MEDICAL, AND LIFE BENEFIT PLAN; TRUSTEES OF THE PIPEFITTERS LOCAL UNION NO. 522 HOSPITAL, MEDICAL, AND LIFE BENEFIT PLAN; and JOSEPH WARREN, in his official capacity as a trustee of the Pipefitters Local Union No. 522 Hospital, Medical, and Life Benefit Plan, *Defendants-Appellees.*	) from the United) States District) Court for the) Western District) of Kentucky

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Decided and Filed August 29, 1996

Before: RYAN and NORRIS, Circuit Judges; JOINER, District Judge.*

CHARLES W. JOINER, District Judge. Plaintiffs, 147 members of Pipefitters Local 633, appeal the judgment against them in this action brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. Plaintiffs claim that the trustees of the welfare benefit plan to which they belonged violated two provisions of ERISA by charging plaintiffs a contribution rate higher than that charged to plan members who belonged to Local 522. The district court concluded that the trustees permissibly could differentiate between the two locals in setting the contribution rates, and dismissed plaintiffs' claims. We affirm.

I.

A.

The essential facts are not in dispute. In 1955, Pipefitters Local 522, based in Louisville, Kentucky, established the Pipefitters Local No. 522 Hospital, Medical, and Life Benefit Plan (the "plan"). In 1970, members of Local 633, which is based in Owensboro, Kentucky, were permitted to join the plan as a group. The plan is a multi-employer, union-sponsored welfare benefit plan that pays scheduled medical, health, and life benefits on claims made by participants. The plan is funded primarily with contributions from the employers of plan participants. The amount of employer contributions is governed by the collective bargaining agreement entered into

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*The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

between the local and the association of employers for whom the local's members work, and is calculated as an hourly rate based on hours worked by each employee. If a participant does not work and thus does not earn employer contributions, he may make direct contribution to the plan to continue coverage. Prior to 1990, contribution amount did not vary depending on the local which the employee belonged; as of 1990, the hourly rate was $1.70.

In March 1990, the plan actuary reported an operation loss of $80,449 for the first three months of the 1990 plan year. Further investigation revealed that for the preceding 44-month period, the claims and expenses for Local 633 participants totalled $2,176,611, while contributions by on behalf of these participants totalled only $1,232,702 resulting in a loss of $943,909. The contributions made by or on behalf of Local 522 participants, on the other hand exceeded their claims by $337,432. The plan thus suffer a net operational loss of $606,477 for this 44-month period. The plan ultimately suffered a loss of $359,140 the 1990 for the plan year.

The trustees conferred with counsel, and then voted unanimously to require that each local operate in the black. The trustees promptly communicated their decision to the participants, and informed them as well that a significant increase in the contribution level would be implemented soon. After receiving the actuary's calculations, the trustees sent a letter to participants, stating that in order for each local to be self-supporting, Local 633 participants would be charged $3.36 per hour, and that Local 522 participants would be charged $1.90 per hour. The trustee further explained that if the participants did not pay the designated amounts, the schedule of benefits would be reduced to correspond with the amount paid per hour. Evidently treating the issue before them as one

involving plan administration, the trustees did not formally amend the plan to institute the differentiated contribution rates. In response to the alternatives given to them, a majority of the Local 633 participants voted to obtain insurance from another source, and left the plan.

Structure and Provisions

The plan's definitional sections state that "union" means both Local 522 and Local 633. "Employee" and "eligible employee" are defined without reference to local affiliation. There are no provisions in the plan that authorize trustees to differentiate between participants from the locals in setting contribution rates, nor any provisions that prohibit differentiation between the two locals.

The permissible structure of a union-sponsored bene plan such as the one involved in this case is governed § 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5). As required § 302(c)(5)(B), the plan is administered by a body of trustees, with employers and employees having equal representation. Local 633 joined the plan in 1970 with the understanding that the trustees of the plan would continue to be drawn from Local 522. The trust agreement stated that the trustees are to be drawn from Local 522 and the employers for whom that local's members work, and that Local 633 is entitled to one alternate trustee (who serves a temporary basis in the absence of a regular trustee). In 1990, the two employer trustees were members of the employers association in Louisville, and the two employ trustees were the business manager and senior business representative of Local 522.

The trustees' powers and duties are detailed in both the plan and the trust agreement. Article IX of the plan states that the trustees are named fiduciaries, and imposes on them the duty to "act solely in the interest of Employees, Dependents, Survivors and Beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses." (Section 9.01.) Article VIII of the plan governs amendments, and provides that the plan "may be amended in any respect at any time . . . by a resolution adopted by a majority vote of the Trustees, effective as of the date set forth in the resolution[.]"[1] Article X states that "[a]ny rules, regulations, or procedures that may be necessary' for proper administration or functioning of this Plan that are not covered in this Plan or the Trust Agreement shall be promulgated and adopted by the Trustees."

The trust agreement grants broad powers to the trustees:

> To decide all questions or controversies arising in any manner or between any parties or persons in connection with the Health and Welfare Fund or the operation thereof, whether as to any claim for benefits made by any Employee, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or established by this instrument, or as

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[1]Several limitations are set forth on the ability to amend, none of which is relevant to plaintiffs' claims. The plan may not be amended to change the requirements that the union and employers association have equal numbers of trustees; that there be an annual audit of the plan; and that no portion of the fund may be diverted to a use other than for the benefit of beneficiaries. These limitations derive from LMRA § 302(c)(5).

> to any writing, decision, instrument, or accounts in connection with the operation of the Health and Welfare Fund otherwise. The decision of the Trustees shall be binding upon all persons dealing with the Health a Welfare Fund or claiming any benefits thereunder.

(Section 2.2.) Section 7.1 vests administration of the trust fund "wholly in the Trustees" and grants the trustees the power to "obtain and evaluate all statistical and actuarial data which may be reasonably required with respect to the administration of the Health and Welfare Plan" and make such other rules and regulations as may be necessary for the administration of the Plan. Section 7.2(l) authorizes the trustees to "[p]repare, promulgate and issue rules and regulations pertaining to application for benefits of the
Fund, eligibility requirements to participate in the same and types and kinds of benefits to be secured from proceeds of the Fund.

B.

Plaintiffs filed suit in 1991 against the plan and its trustees, claiming that the trustees breached their fiduciary duties and improperly discriminated against them by charging them a higher contribution rate than that charged to members of Local 522. The case was submitted to the court on the basis of a stipulated record. In granting judgment in defendants' favor on the breach of fiduciary duty claim, the court relied on Sixth Circuit precedent holding that the trustees of a multi-employer welfare benefit plan do not act in a fiduciary capacity in amending the terms of a plan to protect the plan's financial solvency. The court dismissed the discrimination claim,

concluding that plaintiffs had not demonstrated that defendant discriminated against them with respect to a right vested under ERISA.

II.

Plaintiffs challenge the trustees' decision to set individual contribution rates for each local on two grounds. First, they claim that the trustees breached their fiduciary duty to the members of Local 633, in violation of ERISA § 504, 29 U.S.C. § 1104. Second, they claim that the trustees' decision constituted discrimination prohibited by ERISA § 409, 29 U.S.C. § 1109. We consider each argument in turn.

A.

Alleged Breach of Fiduciary Duty

The plan at issue is an employee welfare benefit plan as defined under ERISA, 29 U.S.C. § 1002(1), as it provides medical, health and life benefits. As the Supreme Court recently cautioned, ERISA does not create a substantive entitlement to such benefits, and employers and plan sponsors are generally free to adopt, modify or terminate such plans "for any reason at any time." *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995). "Nor does ERISA establish minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans." Id. Thus, plaintiffs had no vested right to continuation of the same schedule of benefits or the same contribution rates. Nonetheless, the trustees of the plan are fiduciaries under ERISA, and owe certain duties to the participants of the plan. The questions presented by this case are whether the specific decision at issue is subject review for compliance with ERISA's fiduciary duties, and if so, whether

plaintiffs demonstrated that the trustee breached those duties.

A person is a "fiduciary," as that term is defined in ERISA § 3(21)(A), only when performing certain functions; e.g., "exercises any discretionary authority or discretionary control respecting management" of a plan 29 U.S.C. § 1002(21)(A)(i). A fiduciary's functions do not include plan adoption, amendment, design or termination. Thus, it has long been the rule that an employer or plan sponsor does not act in a fiduciary capacity when adopting modifying or terminating a welfare benefit plan. *Curtiss-Wright Corp.*, 115 S. Ct. at 1228 (citing *Adams v Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert denied*, 498 U.S. 984 (1990)).[2] "When employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlers of a trust[.]" *Lockheed Corp. v. Spink*, 116 S.Ct. 1783, 1789 (1996) (citations omitted).

In *Pope v. Central States Health and Welfare Fund, 2* F.3d 211 (6th Cir. 1994), this court extended the rule announced in *Adams* to a multi-employer welfare benefit plan such as the plan at issue here. The court explained:

> The trustees of a multi-employer plan do not act in the role of employers when enacting plan amendments which simply affect the allocation of an asset pool among participants and beneficiaries. However, multi-employer plan trustees assume a position analogous to that of a single-employer plan administrator when they amend a plan to protect its financial stability. As

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[2]The Supreme Court recently extended this rule to pension benefit plans in *Lockheed Corp. v. Spink*, 116 S.Ct 1783 (1996).

> in cases involving single employer plans, the policy encouraging employers to establish welfare benefit plans is served by permitting trustees of multi-employer plans to amend such plans without fiduciary considerations.

Id. at 213 (citations omitted).

Relying on *Pope*, the district court held that the trustees' decision to set independent contribution rates for each local was not subject to review for compliance with fiduciary duties. Plaintiffs contend that *Pope* does not apply because a decision of plan trustees is insulated from review for compliance with fiduciary duties only when the decision takes the form of a plan amendment, as it did in *Pope*. Despite the fact that the trustees' decision was unanimous, while the plan may be amended "in any respect at any time" by a majority vote of the trustees, plaintiffs contend that the lack of a formal amendment renders the trustees' decision subject to review for compliance with fiduciary obligations.

We are persuaded that *Pope* does not apply, although not entirely for the reasons advanced by plaintiffs. The lack of a formal amendment certainly provides a basis on which to distinguish Pope. Equally important, however, is the fact that the decision at issue was not one which affected plan design or which altered any existing plan terms. Rather, the decision was an administrative one, squarely within the powers of the trustees to make, but one which did not "modify" or "amend" the plan. Thus, the trustees, in making this decision, did not act in a manner analogous to settlers of a trust, but, rather, as administrators exercise the discretionary authority granted to them under the plan.

This means, of course, that the trustees' actions subject to review for compliance with ERISA's fiduciary obligations. Based upon the broad grant of powers to the trustees, however, we review the trustees' actions determine only if they were arbitrary and capricious. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 *(1989); Whisman v. Robbins*, 55 F.3d 1140, 1144 (6th Cir. 1995) (plan provisions similar to those in this case entitled trustees to arbitrary and capricious standard of review). A determination by plan trustees will not be found to be arbitrary and capricious if it is rational in light of the plan provisions. *Perry v. United Food and Commercial Workers Dist. Unions 405 and 442*, 64 F.3d 238, 242 (6th Cir. 1995) (citing *Miller v. Metropolitan Life Ins. Co.*, 925 F. 979, 984 (6th Cir. 1991)).

> This standard "is the least demanding form of judicial review of administrative action . . . . When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious."

Perry, 64 F.3d at 242 (citation omitted).

Plaintiffs claim that the trustees breached their fiduciary duties as set forth in ERISA § 504, 29 U.S.C. § 1104(a)(1),[3] by

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[3]Plaintiffs rely on § 1104(a)(1)(A), (B) and (D), which provide that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their

choosing to discriminate against the plaintiffs because they belonged to a different local. According to plaintiffs, the trustees breached their duty of loyalty as well as their obligation under the plan not to divert any benefit for purposes other than for the exclusive benefit of the participants. The sole evidentiary basis for plaintiffs' argument is the fact that the plan's trustees were drawn from Local 522, an arrangement to which Local 633 agreed upon joining the plan. The fact that Local 633 was not represented on the board of trustees is not alone wrongful, however. As noted, the composition of the trustee body for a union-sponsored plan such as this is governed by LMRA § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B), which requires only that employees and employers have equal representation, not parity between the representatives of each union. *International Bhd. of Teamsters, Joint Council 18 v. New York State Teamsters Council Health, and Hosp. Fund*, 903 F.2d 919, 922 (2d Cir.), *cert. denied*, 498 U.S. 898 (1990). Nor will we infer that the trustees acted improperly merely because they necessarily would be affected by any decision which resolved the

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beneficiaries;

. . . .

(B) with the care, skill, prudence,and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

. . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

need to raise contribution rates. *See Mahoney v. Board of Trustees,* 973 F.2d 968, 971-73 (lst Cir. 1992) (trustees' status as beneficiaries does not necessitate strict standard of review of their decisions; decisions remain subject to arbitrary and capricious standard of review).

Thus, we are left with the simple inquiry whether there was a reasonable basis for the trustees' decision. The answer cannot seriously be debated. The trustees were faced with a situation in which the plan was suffering significant losses that were attributable to the claims history of only one local's members. In light of these losses, the trustees were obligated to increase the contribution rates. Nothing in the plan prohibited them from doing so by instituting distinct rates, and their decision to do so appropriately placed the burden of the increased costs on the participants whose claims experience was responsible for those costs.

In reaching this decision, we draw guidance from *Mahoney v. Board of Trustees,* 973 F.2d at 973-74, a case in which the trustees of a multi-employer pension plan significantly increased the size of retirement pensions, but did so unevenly, treating participants who had already retired less favorably than those who were still working. Writing for the court, then-Judge Stephen Breyer held that this decision was not arbitrary and capricious. The court noted that increased pensions would require increased contributions, the burden of which would fall on those participants who were still working. It was thus fair to pay those workers the higher benefits. While noting that a perfect match between contribution and benefit level was neither a practical possibility nor legally required, the court recognized that the trustees' effort to achieve a reasonable level of parity was not arbitrary and capricious.

Just as it was reasonable for the trustees in *Mahoney to* attempt to match the level of benefit with the level of contribution, it was reasonable for the trustees in this case to match the level of contribution with the level of benefit provided. We thus conclude that the trustees' decision to institute independent contribution rates for each local was not arbitrary and capricious, and affirm the district court' grant of judgment in defendants' favor on this claim.

B.

Allegedly Unlawful Discrimination

Plaintiffs also claim that defendants violated ERISA § 510, 29 U.S.C. § 1140,[4] which prohibits discrimination against a participant for exercising a right protected by the plan or ERISA, or for the purpose of interfering with the attainment of any right to which the participant may become entitled. The district court dismissed plaintiffs' claim, holding that no impermissible discrimination occurred because the trustees did not interfere with a vested right to benefits. This court recently held, however, that § 1140 "prohibits interference with rights to which an employee 'may become entitled' under 'an employee

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[4]Section 1140 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

benefit plan' and does not limit its application to benefits that will become vested." *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996).[5] We nonetheless affirm the district court's decision on two independent grounds.

First, a plaintiff under § 1140 must demonstrate that the action at issue was taken with the specific intent to violate ERISA, i.e., that a motivating factor in the defendant' action was the purpose of interfering with the plaintiff' entitlement to benefits. *Shahid*, 76 F.3d at 1411. The record is devoid of evidence supporting this element of § 1140 claim. Rather, the record supports the conclusion that the trustees increased the contribution rates, first, to protect the solvency of the plan, and second, in an effort to distribute the cost of benefits fairly between the two locals. Rather than interfering with the attainment of benefits, the trustees' actions insured that the fund would remain solvent, and that each group of participants would receive the benefits for which they paid.

Second, as explained by this court in *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1391 (6th Cir.), *cert. denied*, 115 S. Ct. 193 (1994), § 1140 was enacted primarily to prevent employers from discharging or harassing their employees in order to prevent them from attaining benefits. "'Congress designed [§ 1140] primarily to protect the employment relationship that gives rise to an individual's pension rights.' For conduct to fall within the parameters of § 1140, it 'must affect the individual's employment

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[5]Shahid also resolves defendants' argument, not addressed by the district court, that plaintiffs lack standing to assert their claims. The court held that a plaintiff has standing where, but for the alleged wrongful acts, the employee "' would have been eligible to become a member of the plan.'" Shahid, 76 F.3d at 1410-11 (quoting Swinney v. General Motors Corp., 46 F.3d 512, 519 (6th Cir. 1995)). Plaintiffs clearly meet that test here.

relationship in some substantial way.' Section 1140 'does not purport to protect the financial security of pension funds.'" Id. (quoting *West v. Butler*, 621 F.2d 240, 245-46 (6th Cir. 1980) (internal citations omitted). Plaintiffs have neither alleged nor demonstrated that the trustees' actions affected their employment relationships as required *by Adcox*.

In sum, plaintiffs have not demonstrated that the trust actions constituted discrimination prohibited under § 1140.

AFFIRMED.

APPENDIX B -- FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY FILED DECEMBER 6, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

TOMMY J. ABBOTT, et al.,
Plaintiffs,

CIVIL ACTION
No. C91-0158-L(A)

v.

PIPEFITTERS LOCAL UNION NO. 522, HOSPITAL, MEDICAL AND LIFE BENEFIT FUND, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

The parties in this case waived trial. The matter is submitted to the Court for decision on the merits on the basis of the pleadings filed, the depositions in the case, and a stipulated set of exhibits. For the reasons set out below, we will direct a judgment in favor of the defendants.

On August 1, 1955, the defendant Pipefitters Local

Union No. 522 (hereinafter "Local 522") established an Employee Welfare Benefit Plan for the benefit of its members. The Plan provided for payment of hospital, medical, and life insurance benefits, and when the Employment Retirement Income Security Act of 1974 ("ERISA") came into being, the Plan became subject to the requirements of that statute. See 29 U.S.C. §§ 1001-1461.

In 1970, members of Plumbers and Steamfitters Local No. 633 (hereinafter "Local 633") were permitted to join the Plan as a group. Members of that union were allowed under the condition that the Plan trustees would continue to be drawn from Local 522.

The Plan is primarily funded by contributions from the employers of the Plan participants. Collective Bargaining Agreements were reached by the two unions and their employers as to the amount of contributions to be funded by the employers. In addition, if a participant was not working at any time and was not earning employer contributions, he could make contributions to the Plan so as to continue coverage. The Plan paid insurance benefits on claims made by participants, and the claims were processed by Blue Cross/Blue Shield.

In 1988, the Plan suffered a loss of $122,970.00, that being the amount by which benefits and expenses exceeded contributions. The Plan actuary reported in March 1990 that the Plan had suffered a loss of $80,449.13 for the months of August through October, 1989, and the actuary projected that the Plan would suffer a loss of $359,140.00 for the 1990 Plan year.

In May 1990, the Plan actuary reported that for the 44-month period ending March 31, 1990, the total costs associated with claims made by members of Local 633 exceeded contributions made on their behalf by approximately $1,223,913.00. After receiving that information, the trustees decided that the financial stability of the Plan as a whole required amendment to account for this dramatically different

claims experience between the two Local unions. To accomplish this, the trustees determined that members of Local 633 would have to either increase their contributions to the Plan or accept a reduction in benefits. Charles Isenberg, counsel for the Plan, advised the Plan that this legally could be done, and on May 30, 1990, the trustees advised the members of Local 633 of the financial status of the Plan and of the decision that both groups must remain in the black. The memorandum gave the members of Local 633 notice of a substantial increase in their contribution levels effective August 1, 1990.

On June 13, 1990, the actuary for the Plan submitted a report covering the period August 1, 1986 through March 31, 1990. The figures showed a deficit of $943,909.00 for the members of Local 633 as compared with a surplus of $447,432.00 for the members of Local 522.

On June 22, 1990, trustees of the Plan offered the members of Local 633 the option of accepting a higher contribution rate or maintaining the existing level of contributions for a reduced level of benefits. Following that offer, the majority of the voting members of Local 633 voted to obtain insurance from another source.

Section 6.02 of Article 6 of the Hospital, Medical, and Life Benefit Plan provides, in essence, that the trustees of the Plan shall interpret the Plan and determine all questions arising in the administration, interpretation and application of the Plan. All trustee determinations are to be final except for claims to payment, denial of which may be appealed by the claimant. Article 6 also refers to the Trust Agreement. Section 2.2 of the Trust Agreement grants the trustees the power to decide all questions of controversy arising in connection with the operation of the health and welfare fund or otherwise. Section 2.3 gives the trustees the power to administer or delegate responsibility for the administration of the health and welfare plan which shall set forth the benefits to be provided from the

trust fund, conditions of eligibility, terms of payment, and such other items as the trustees deem necessary to include. Section 1 grants the trustees the authority to obtain and evaluate statistical and actuarial data and to make rules and regulations that are necessary for the administration of the plan. Section 7.21 grants the trustees the authority to prepare, promulgate rules and regulations pertaining to application for benefits of the fund, eligibility requirements, and the kind of benefits to be secured from the proceeds of the fund.

Count I of the plaintiffs' complaint alleges that the defendants acted improperly when they modified the Plan to provide that members of Local 633 either increase their contributions to the Plan or have their benefits reduced. Plaintiffs claim a breach of fiduciary duty under ERISA.

ERISA addresses both employee pension benefit plans and welfare benefit plans. In the case at bar, we are dealing with a welfare benefit plan, and not a pension benefit plan. Case law makes it amply clear that modifications to a welfare benefit plan may be made without imposing liability on the trustees of the plan if the modifications were made for the purpose of helping or preserving the financial stability of the plan. Noting that Congress intentionally limited vesting to pension plans rather than extending it to welfare benefit plans, the Sixth Circuit has held as follows:

> In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. ...[W]e employ the rule, already announced by this circuit as dicta in Musto [v. American General Corp], 861 F.2d [897] at 911, that a company

> does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.

Adams v. Avondale Industries, Inc., 905 P.2d 943, 947 (6th Cir. 1990).

The fact that amendment of the plan may involve some discrimination among participants does not change this principle (so long as the amendment is prospective, of course, as it is in this case). ERISA prohibits discriminating against a beneficiary "for exercising any right to which he is entitled." 29 U.S.C. Sec. 1140. However, as observed above, a beneficiary cannot obtain a vested right to a benefit under a health and welfare plan.

The significance of this sweeping rule is demonstrated in the case of Pope v. Central States Southeast & Southwest Areas Health & Welfare Fund, 27 F.3d 211, 1994 FED App. 0209P (6th
Cir. 1994). The plaintiff's decedent, a member of a welfare benefit plan, was diagnosed in 1987 with an end-stage liver disease, and his claims were paid under the terms of the welfare benefit plan which was in effect in that year. However, in 1987 the Plan suffered a $64,000.00 loss, which led to the enactment of a $50,000 lifetime coverage limit on benefits for liver transplants and other transplant procedures effective January 1, 1989. In January 1989, Mr. Pope received a second liver transplant, and defendant refused to pay benefits beyond the $50,000 coverage limit.

Judge Siler, writing the opinion for the Court, held that the trustees had the right to amend a plan to protect its financial stability, and that in so doing, the trustees are not subject to the fiduciary obligations imposed by ERISA.

A similar holding is found in Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1983). Owens worked for defendant Storehouse and participated in an employee welfare benefit plan

which provided group hospital and medical benefits up to a lifetime maximum of $1,000,000. That plan had been initiated in January 1988. In November 1981, Owens was diagnosed with acquired immune deficiency syndrome (AIDS). Shortly thereafter the insurer notified Storehouse of its intent to cancel the insurance policy because of the high incidence of AIDS in the retail industry and among Storehouse plan members. Negotiations followed, and a new policy was issued which provided less coverage at greater expense, and was guaranteed for only six months. It also required Storehouse to remain self-insured for $75,000 in AIDS-related claims as opposed to $25,000 for all other claims.

Faced with the added possibility that at the end of six months Storehouse would have to be self-insured for all claims up to $1,000,000 per employee, the trustees sought another carrier which advised that it could insure the Storehouse plan only by placing a maximum lifetime limit on coverage of AIDS and AIDS-related illnesses. Storehouse modified the plan to include a $25,000 cap on all AIDS-related claims. Following the cap and despite the $25,000 coverage, Storehouse paid $116,000 for Owens' AIDS-related claims but then notified him that it would adhere strictly to the modified plan in the future.

The Storehouse Court held that ERISA does not prohibit a company from terminating previously offered benefits that are neither vested nor accrued. As the court pointed out, Congress intended employers to be free to create, modify or terminate the terms and conditions of employee welfare benefit plans as inflation, changes in medical practice and technology and the cost of treatment dictate, citing Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988), and Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

As the Court pointed out in Storehouse, unless there is a contractual obligation, employers may increase or decrease

welfare benefits. In McGann v. H & H Music Co., 946 F. 2d 401 (5th Cir. 1991), cert. denied, sub nom Greenberg v. H & H Music Co., 113 S.Ct. 482 (1992). In that case, the plaintiff notified his employer that he had AIDS in March 1988. At that time the group medical plan under which he was insured provided for lifetime medical benefits of up to $1,000,00 to all employees. In July 1988, the employees were notified that effective August 1, 1988 benefits payable for AIDS-related claims would be limited to $5,000; no limits were placed on any other catastrophic illness. By January 1990, McGann had exhausted the $5,000 limit on coverage and sued under 29 U.S.C. § 1140. The Court held that the defendant was entitled to summary judgment, and that 29 U.S.C. § 1140 and ERISA do not broadly prevent an employer from discriminating in the creation, alteration, or termination of employee benefit plans. The statutes do not prohibit an employer from choosing not to cover AIDS or to cover AIDS in a reduced amount while covering other catastrophic illnesses even though there may be some prejudice against AIDS or its victims: "[D]iscrimination is illegal only if it is motivated by a desire to retaliate against an employee or to deprive an employee of an existing right to which he may become entitled." Id. at 408..

The case of Aronson v. Servus Rubber Division of Chromalloy, 730 F.2d 12 (lst Cir. 1984) is also instructive on the question of discrimination. Servus Rubber operated two plants, and the employees at both plants were covered by an employee benefit plan which called for employer contributions based on profits. In 1981, the parent company sold the assets of one of the plants and began laying off its employees. The company contributed to the plan with regard to the employees at the retained plant, but did not contribute with regard to the employees of the plant it closed. The First Circuit held that because ERISA explicitly sanctions partial terminations, it cannot be interpreted as forbidding any discrimination among

beneficiaries: "A termination that cuts along independently established lines -- here separate division -and that has a readily apparent business justification, demonstrates no invidious intent. Id. at 16.

While ERISA protects a person from discrimination in retaliation for exercising any right to which he is entitled under the provisions of an employee benefit plan or for the purpose of interfering with the attainment of any right to which the participant may become entitled, plaintiffs have not shown that they have met either of these two conditions. Regardless of any opinion a court may hold as to the fairness of discrimination among participants, the judiciary is not free to disregard the will of Congress.

Plaintiffs' claims in Count II were based on the theory that defendants interfered with the lawful rights of the plaintiffs by instructing Blue Cross/Blue Shield to refuse to pay for benefits owed to the plaintiffs. The evidence shows that the plan instructed Blue Cross/Blue Shield to hold certain claims in suspense. After this action, Mrs. McCoy, the former assistant to the administrator of the plan, directed Blue Cross/Blue Shield to release from suspense the claims on behalf of members of Local 633 whose premiums were paid.

Plaintiffs have requested monetary relief from Joseph Warren, who was a trustee, and who is now retired. The Court having held that the trustees legally modified the plan, there is no basis for a viable claim against Mr. Warren. That claim will be dismissed.

Plaintiffs also ask for damages. The Supreme Court has held in Mertens v. Hewitt Associates, 124 L.Ed.2d 161 (1993), that compensatory damages are not available in an ERISA action of fiduciary duty theory. See memorandum by District Judge Charles Simpson in Sidebottom, et al. v. Packaging service Corp. of Ky., et al., on March 24, 1994, civil action No. 92-0459-L(CS).

In conclusion, judgment will be entered for the defendants.

Dated /S/ 12/6/94

/S/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

TOMMY J. ABBOTT, et al.,
Plaintiffs,

CIVIL ACTION
No. C91-0158-L(A)

V.

PIPEFITTERS LOCAL UNION NO. 522, HOSPITAL, MEDICAL AND LIFE BENEFIT FUND, et al.,
Defendants.

JUDGMENT

This matter having been submitted upon an agreed record, and the Court having entered its Findings of Fact, Conclusions of Law and Memorandum Opinion,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants.

This is a final and appealable order and there is no just cause for delay.

December 6, 1994

/S/ Charles M. Allen
CHARLES M. ALLEN
Senior United States District Judge

cc: Counsel of Record